Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	:	
	:	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	:	MM Docket 92-266
	:	
Rate Regulation	:	

RECEIVED
FEB 11 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF THE CITY OF BAYONNE, NEW JERSEY

The City of Bayonne, New Jersey hereby submits these reply comments in the above-captioned proceeding.

I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission"), by Notice of Proposed Rulemaking published January 4, 1993, seeks comment on proposed rules to implement Sections 623, 612, and 622(c) of the Communications Act of 1934 ("Communications Act") as amended by Sections 3, 9 and 14 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").

The City of Bayonne (the "City") is located in Hudson County, New Jersey, and occupies a three-mile long peninsula dividing the waters of the New York and Newark Bays. Bayonne has a population of over 61,400 and has approximately 24,000 households.

Bayonne was one of the first cities in New Jersey to become involved in adjudicative proceedings concerning renewal of a cable television franchise. In June of 1989, based upon the City's review of its cable operator's past performance and its assessment of the community's future cable-related needs, the City Council voted unanimously to deny the

operator renewal of municipal consent to operate a cable system in Bayonne. The City's decision to initially oppose franchise renewal was based in part on the public's expression of overwhelming dissatisfaction with subscription rate increases in Bayonne. The operator appealed to the New Jersey Board of Public Utilities, thereby commencing a protracted administrative process, which resulted in a negotiated settlement. The settlement entered into by the City and cable operator provided for renewal of the franchise on terms substantially more favorable to the City than those of the initial franchise.

The City of Bayonne has had an opportunity to review the comments filed in this proceeding by the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, "Local Governments"). The City is in substantial agreement with the position taken by the Local Governments, and is filing these reply comments to address some of the matters covered in the Local Governments' comments that are of particular interest to the City.

II. DISCUSSION

The City of Bayonne agrees with the Local Governments that the Commission's primary goal in rate regulation should be to ensure that "where cable television systems are not subject to effective competition, . . . consumer interests are protected in the receipt of cable service." Section 2(b)(4), 1992 Act. Additionally, the regulations adopted by the Commission should "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission." Section 623(b)(2)(A). The City of Bayonne believes that administrative efficiency could best be achieved if the Commission

were to grant franchising authorities maximum flexibility in enforcing the commission's regulations for the basic cable tier and to defer to a franchising authority's application of such regulations, provided such application is not in conflict with the Commission's regulations, or is not arbitrary or capricious. The City further urges the Commission to grant franchising authorities a significant role in enforcing the Commission's regulations governing rates for cable programming services, leased access, and subscriber bill itemization.

A. The 1992 Act Requires the Commission To Reduce Current Rates Found To Be Unreasonable

The Commission's Notice of Proposed Rulemaking seeks comment on whether the 1992 Act embodies "a congressional intent that our rules produce rates generally lower than those in effect when the Cable Act of 1992 was enacted (and if so, to what degree), or, rather a congressional intent that regulatory standards serve primarily as a check on prospective rate increases." 58 Fed. Reg. 49 (1993). The City of Bayonne agrees with the Local Governments that Section 623 and the legislative history of the 1992 Act evidence clearly Congress's intent that *current* cable rates be reasonable. To the extent current rates are not reasonable, the law requires the Commission to reduce such rates.

No statutory limit has been placed on the FCC's power to ensure that rates are "reasonable." The goal of the Commission's regulation must be to protect cable subscribers of any system that is not subject to effective competition from basic service rates that exceed the rates that would be charged if the system were subject to effective competition. Section 623(b)(1). If the Commission were to allow cable operators with existing rates exceeding a competitive rate to continue charging such rates, this goal could not be achieved.

Section 623 was not based on a belief that current basic service rates closely approximate the "true" market price, i.e., the just and reasonable rate. See FPC v. Texaco Inc., 417 U.S. 380, 397-99 (1974). It would therefore "contradict the basic assumption" of Section 623 if the Commission failed to reduce current rates that are at monopolistic levels and limited its regulation to future rate increases.

B. Multichannel Video Programming Distributors Do Not Provide "Comparable Programming" Unless They Provide a Similar Number of Channels

The Commission has indicated that in implementing the "effective competition" standard of Section 623(*l*), it may presume that "comparable video programming" exists if a competitor simply offers multiple channels of video programming and if the numerical tests for offering of and subscription to competitive service under Section 623(*l*)(1)(B) are met. The City of Bayonne respectfully disagrees with the Commission's conclusion that "comparable video programming" would exist merely because two distributors each offer multiple channels of video programming.

The City believes that the test should be based on a comparison of the number of channels and types of programming provided by a cable operator and its competitor. A multichannel multipoint distribution system ("MMDS") that provides six channels of non-local television broadcast video programming cannot be said to offer "comparable video programming" to a cable system that provides 50 or more channels of non-local television broadcast programming. Determining the existence of effective competition by *actual comparison* of competitors is an approach widely accepted in antitrust law. See United

States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) (interchangeability rests on considerations as to price, use and qualities).

In comparing the various tiers of programming service offered by multichannel video programming distributors, the City urges the Commission to once again draw upon the accepted approaches found in antitrust law. The proper analysis would be to take into account the unique nature of the package as well as the availability of substitutes for each component. "Comparable video programming" should include only those services that include the entire range of offerings of the original product. See, e.g., United States v. Connecticut National Bank, 418 U.S. 656, 664 (1974) (savings bank's individual services were not substitutes for packages of services offered by commercial bank).

The City of Bayonne agrees with the Local Governments that a 20-percent test would be an easily administrable means of determining when an alternative multichannel video programming distributor offers comparable programming. Under this test, comparable programming would be deemed to be offered if there is a 20-percent or less difference in the number of channels of programming offered by the competitors.

C. Cable Service Should Not Be Considered As "Offered" Unless It is Actually Available

The City agrees with the Commission that a multichannel video programming service should not be considered as "offered" to a household under the effective competition standard unless it is *actually available* to a household. Furthermore, a service should not be considered "actually available" if it is really only technically available. For example, if a direct broadcast satellite service ("DBS") is technically available to the entire country, it should not be considered "actually available" to a particular household or community if the

DBS distributor is not actively marketing the service to that household or community so that potential local subscribers are aware of its availability.

D. The Commission Has Independent Authority To Regulate Basic Cable Rates When The Franchising Authority Does Not Seek To Do So.

In its Notice of Proposed Rulemaking, the Commission tentatively concludes that it has the power to regulate basic cable service rates only if it has disallowed or revoked a franchise authority's certification to regulate basic rates. The City of Bayonne respectfully disagrees with this interpretation of the 1992 Act. Section 623(b)(1) mandates that the Commission ensure, by regulation, that rates for the basic service tier are reasonable. This mandate must be read as providing the Commission authority over basic cable rates in areas in which local authorities have not sought certification from the Commission to regulate basic rates. An interpretation of Section 623 that the FCC does not have authority to regulate basic rates would render Section 623(b)(1) meaningless. Such a result must be avoided if possible. See United States v. Harbour, 809 F.2d 384, 391 (7th Cir. 1987); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 871 (D.C. Cir. 1979).

A determination by the Commission that it is not obligated to regulate rates except in the limited circumstances where it disapproves of, or revokes, a franchising authority's certification would frustrate Congress' intent to protect subscribers from cable operators' monopolistic pricing practices. The legislative history of the 1992 Act demonstrates that Congress did not intend for cable operators to continue to exploit cable subscribers in franchise areas that do not have the resources to regulate cable rates.

E. Cable Operators Should Have The Burden Of Demonstrating That They Are Subject To Effective Competition In a Franchise Area

The City of Bayonne urges the Commission not to place the burden on a franchising authority to demonstrate that a cable operator is not subject to effective competition. Most franchising authorities do not have the data necessary to make a finding regarding the extend to which their cable operator competes with an alternative multichannel video programming distributor. "Wireless cable" systems, such as DBS, MMDS, and SMATV are not usually regulated by franchising authorities and therefore, are not usually subject to the necessary reporting requirements.

The City supports the Local Governments' position that effective competition should be presumed not to exist in a franchise area. The Commission's certification form should reflect such a presumption and not impose on a local government the burden of demonstrating that a cable system is not subject to effective competition. The burden would then be on a cable operator to overcome the presumption. It is fair to place this burden on the cable operator because it has data evidencing its penetration rate, the number of households it serves, and other data relevant to determining whether effective competition exists. Placement of this burden on cable operators is consistent with the Commission's current regulations at 47 C.F.R. §76.33(a)(1). See also FPC v. Texaco, Inc., 417 U.S. 380, 391 (1974) (those whose rates are regulated characteristically bear burden and risk of justifying their rates and costs).

F. Rates Should Continue To Be Regulated While Petitions for Revocation Are Pending

Section 623(a)(5) requires the Commission to review the regulation of cable system rates by a franchising authority "upon petition by a cable operator or other interested party." The City of Bayonne requests that the Commission make clear in its regulations that a franchising authority continues to have the right to regulate rates during the time that such a petition for revocation is pending. Without such a provision, cable operators will have an incentive to file meritless petitions with the Commission in order to delay the rate protections Section 623 provides consumers.

G. The Commission Should Adopt A Benchmarking Approach To Rate Regulation

The City of Bayonne urges the Commission to adopt a benchmark rate as a price against which a given cable system's basic tier rate can be compared. The benchmark would permit easy identification of systems with presumptively unreasonable rates, and establish a zone of reasonableness for systems with rates below the benchmark. In addition, the City agrees with the Commission's suggestion to establish a price cap formula that would limit how quickly systems with rates below the benchmark could raise their rates to that benchmark price.

The City agrees with the Local Governments that a benchmark model of rate regulation would best achieve Congress' statutory goals. Because the benchmark would be based on rates charged by cable systems subject to effect competition, such a model would meet the primary directive of the 1992 Act to ensure that subscribers in areas not subject to effective competition pay rates that are no higher than those paid by subscribers in areas

subject to effective competition.

The benchmark would also accomplish the 1992 Act's directive that the regulatory structure not impose undue administrative burdens on subscribers, cable operators, franchising authorities, or the Commission. Use of the alternative mode of rate regulation, a case-by-case cost-of-service approach, would necessitate extensive cost accounting requirements that would impose a substantial additional burden on both the regulators and regulatees.

The City would also support the Commission's creation of distinct classes of cable systems based upon a limited number of specified variables, with different benchmarks established for each class of systems. The City suggests that the following variables be used to separate cable systems into distinct classes: the number of homes passed per mile; number of miles of underground cable; number of channels; and system age. Benchmarks would then be set forth in a matrix or table. The City would also add the following caveat: the matrix or table must be designed so that franchising authorities can *easily* determine which matrix rate applies to its cable system.

H. Rates for Equipment and Installation Should Be Separated From Basic Tier Rates

The City believes that the language and legislative history of Section 623 support the Commission's conclusion that Congress intended to separate rates for equipment and installation from other basic tier rates. The City agrees with the Commission that it would be consistent with the 1992 Act's intent for installation rates to be unbundled from rates for the lease or sale of equipment. The City further agrees with the Commission that the unbundling of equipment and installation charges may foster an environment in which a

competitive market for equipment and installation may develop.

I. Rates for Connection of Additional Television Sets Should Be Based On Actual Cost.

The City of Bayonne agrees with the Commission's tentative conclusion that rates for installation and use of connections for additional television receivers should be based on "actual cost." Such "actual cost" regulation should not include any charge for the programming services received over an additional television set, because the cable operator has already recovered such costs in the rate charged for cable service at the first television set.

J. Franchising Authorities Should Have The Right To Obtain Information

The City of Bayonne agrees with the Local Governments that the Commission's regulations should clarify the right of a franchising authority to obtain any and all information necessary for the franchising authority to make a decision regarding rates. Congress intended the Commission to have all financial information that may be needed for the purpose of administering and enforcing the rate regulation section of the 1992 Act. Section 623(g). Congress was aware that local franchising authorities would also be exercising rate regulation responsibilities and clearly intended that franchising authorities also have the financial information necessary to do so.

The franchising authorities' right to information should include any proprietary information concerning cable programming costs and any other matters that a franchising authority reasonably believes is needed to make a rate determination. Cable operators' claims that they have a proprietary interest in such information are not sufficient reason to

withhold such information from franchising authorities, because a franchising authority can promulgate regulations designed to protect such information from public disclosure.

III. CONCLUSION

The City of Bayonne believes that the recommendations made herein relative to implementation of Section 623 of the Communications Act of 1934, if adopted, will help protect subscribers from the monopolistic rates currently being charged by cable operators, without adding any undue administrative burden on cable operators.

Respectfully submitted,

Gary D. Michaels
KRIVIT & KRIVIT, P.C.
50 E. Street, S.E., 2nd Floor
Washington, D.C. 20003
(202) 544-1112

Date: February 11, 1993

Counsel for the City of Bayonne, New Jersey